STARE DECISIS AND THE FOURTEENTH AMENDMENT.

The principle voiced in the maxim, *stare decisis et non quieta movere*—to stand by precedents and not to disturb what is settled—has been known to all systems of judicature. Former judicial decisions as a source of law were recognized as far back as the ancient Egyptians. In some measure this principle operated in the Roman law and is not without force in those modern outgrowths of the Roman system.[1]

The full development of this doctrine is found in the English Common Law. It is founded on the principle that stability and certainty in the law are of first importance. When a point of law is once clearly decided by a court of final jurisdiction, it becomes a fixed rule of law to govern future action. The certainty of the law is regarded as of more importance than the reason of it. It is better to have a bad law with certainty of its meaning than a good law whose scope of operation is indefinable and unknown.

The doctrine of *stare decisis* is of the utmost importance to the whole Anglo-American system of judicature. The case system of the study and the practice of law is based directly upon it. It operates strongest where rights of contract or property *inter partes* are involved. The reason is apparent. When property rights are once fixed, especially titles to real property, they cannot be disturbed without great injustice to those who have based their actions and entered into business relations on the basis of such former decisions. Faith in the stability of the law is essential to the health of the business world. *Misera est servitus ubi jus est vagum aut incertum.* The courts are not at liberty to consider cases *de novo.*

On the other hand, the doctrine of *stare decisis* is much weaker in the realm of constitutional law. This is inevitable. Constitutional law is organic. It grows. It is an expression of the life of the social organism. This phase of the public law cannot be bound by precedents to the same extent as private law.

The principle of *stare decisis* is of peculiar importance in its relation to the operation of the Fourteenth Amendment to the Constitution of the United States. We shall confine our study to section one of that article, the other four sections being now possessed of little or no vitality. It reads as follows:

[1]See 9 Harv. L. Rev. 27, 31. "Judicial Precedents" by John Chipman Gray.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Now this section does not define itself. Its terminology, although time-honored among people of English stock, is, in its new setting, vague, indefinite and uncertain. Under our constitutional system the Supreme Court of the United States is the only organ of the Government to which the people can look for a definition. Cases under the Amendment began coming before that tribunal as early as 1873 but the court thought it wiser to leave the definition of the meaning and scope of its terms to the operation of the doctrine of *stare decisis* rather than to attempt a definition of the whole provision outright. Thus by the gradual process of judicial inclusion and exclusion it was intended that there should be accumulated in the course of time a long line of judicial precedents based on concrete cases presented for decision, which would in themselves define the terms of the Amendment.[2]

In adopting this course the court followed its usual custom of considering only those points which were properly presented and vital to the issue. In this particular the operation of the doctrine of *stare decisis* is reduced to a minimum quantitatively because if a case can be disposed of on a lesser point, the greater will not be considered. The following extract from the opinion in the *Slaughter-House Cases*[3] is an illustration in point:

"Having shown that the privileges and immunities relied on in the argument are those which belong to the citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so."

The Court in this case defined neither citizenship in the United States nor citizenship in the States but declared in effect that in the particular case before it the Federal Government could under the Fourteenth Amendment give no relief from State activity.

[2] *Cf.* Davidson *v.* New Orleans (1877) 96 U. S. 97 and Holden *v.* Hardy (1897) 169 U. S. 366.

[3] (1873) 16 Wall. 36, 78.

From the adoption of the Amendment in 1868 to the close of the 1910-1911 Term of the Supreme Court, six hundred and four opinions have been delivered under section one of that article.[4] We have now a line of decisions running back for forty-one years. Has the operation of the doctrine of *stare decisis* effected a definition of the Amendment? Is its sphere of operation now known? These questions must be answered in the negative. After forty years from the date of the adoption of the Amendment, Mr. Justice Moody in delivering the opinion of the Court in a recent case could say:

"* * * The Fourteenth Amendment withdrew from the States powers theretofore enjoyed by them to an extent not yet fuly ascertained * * *."[5]

In a still more recent case, after five hundred and sixty-seven cases involving an interpretation of the "due process of law" clause under the Amendment had been considered by the Court, Mr. Justice Holmes said:

"But it is familiar that what is due process of law depends on circumstances."[6]

We have made but little progress in reaching even a working definition of section one of the Fourteenth Amendment under the operation of the principle of *stare decisis*. This would be a matter of small practical concern were it not for the fact that the Amendment is fruitful of more litigation before the courts of the country today than any other provision of the Constitution. It is becoming more and more intertwined with the great economic questions of the day. An increasing amount of the time and energy of the Supreme Court of the United States is being consumed in disposing of questions arising under it.

What is "due process of law;" what is "equal protection;" what are the "privileges or immunities of citizens of the United States;" what the relations between citizenship in the United States and State citizenship—we do not exactly know. The policy of the Supreme Court is to wait until a sufficient number of cases have arisen that they themselves will define every phase of the Amendment. This is the only logical position for the Court to adopt. The difficulty is unavoidable. It is practically impossible to define

[4]See table printed at the end of this article.

[5]Twining *v.* New Jersey (1908) 211 U. S. 78, 92.

[6]Moyer *v.* Peabody (1909) 212 U. S. 78, 84.

the Amendment outright and any attempt to do so would be without precedent and dangerous.

The fault is not with the Court but is inherent in the Amendment itself. Its terms are elastic, vague, and indefinite. They are so general and so comprehensive as to embrace within the scope of their operation the entire range of the civil rights of the individual. It is capable of more adaptation, more expansion, and more extension than is any other portion of the Federal Constitution not even excepting the Interstate Commerce Clause. Its place in American Constitutional Law is historically and logically anomalous.

Under the operation of the principle of *stare decisis,* under even more favorable circumstances than now exist, it would require hundreds of years and thousands of cases before an adequate definition could be gleaned bit by bit from the long line of precedents. This means that the essential elements of the Amendment will never be defined. It will always remain a vague, indefinite, and uncertain measure. The circumstances surrounding our social life are constantly changing. The political ideals of one generation are superseded by those of the next; and since the Fourteenth Amendment attempts to deal with the most vital problem in our governmental system—the relations of the States to the Federal Government—we may not hope for a definition of its terms from the operation of the principle of *stare decisis.*

This situation is unfortunate. It is very important that the States should know where they stand in the Federal Government. This is especially true in matters economic where property rights are involved. Within the past forty-one years the Supreme Court of the United States has delivered more than four hundred opinions in concrete cases involving the one question of the States taking property "without due process of law." Less than one hundred of these cases arose prior to 1896. More than one-half of all of them deal with the relations of the States to the corporations—the public service companies forming the predominating element. This is therefore an intensely modern question and one, it seems, which cannot be solved by the courts.

The actual operation of the principle of *stare decisis* in the judicial history of the Fourteenth Amendment is as complex as it is interesting. A case is "followed," "affirmed," "reaffirmed," "applied," "approved," "considered," "explained," "reconciled," "distinguished," "qualified," or "reversed." Each of these words

have become quasi-technical terms. Each is a shade different in meaning from the other in the order named. Each has its proper function in designating the attitude which the Court assumes to the former decision under consideration. Now the Court seldom comes out boldly and reverses itself. Such a procedure would indeed appear unseemly. It is necessary for the sake of stability and propriety that the Supreme Court of the United States maintain an apparent infallibility. But since the laws of evolution do not spare even this high tribunal, and since here also there must be adaptation, discovery, and change to correspond to the growing life of a progressive people, reversals of previous opinions sometimes become necessary. The Supreme Court, bulwark of stability that it is in our constitutional system, in interpreting the Constitution must ultimately yield to the persistent force of public opinion. The changed attitude of the Court is usually expressed by "explaining," "distinguishing," or "qualifying" the prior opinion in question. For example, twenty-three cases were "distinguished" at the 1910-1911 Term of the Court. The effect is often a reversal in whole or in part resulting in a partial or complete change of front. The method is in keeping with the dignity and the learning of that august body, but it involves a species of mental gymnastics that strikes the uninitiated with admiration and amazement.[7]

Now the application of these principles to the interpretation of the Fourteenth Amendment produces considerable uncertainty and confusion. As has been said before, the difficulty is inherent. Not many months ago, Mr. Justice Holmes in a dissenting opinion in an important case under the Fourteenth Amendment, made the following remarks:

"* * * I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should abandon its latest decision, *Security Mut. Life Ins. Co.* v. *Prewitt*, 202 U. S. 246."[8]

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[7]The following may be used as an illustration: In *Ex parte* Harding (1911) 219 U. S. 363, 378, Mr. Chief Justice White, in delivering the opinion said: "We must then either reconcile the cases or if this cannot be done determine which line rests upon the right principle and having so determined overrule or qualify the others and apply and enforce the correct doctrine. * * * " In this case *Ex parte* Hoard (1881) 105 U. S. 578 and the cases following it were *applied;* Virginia *v.* Rives (1879) 100 U. S. 313 and cases following it, *distinguished;* and *Ex parte* Wisner (1906) 203 U. S. 449, *In re* Moore (1908) 209 U. S. 490, and *In re* Winn (1909) 213 U. S. 458, *disapproved in part and qualified.*

[8]Western Union Tel. Co. *v.* Kansas (1909) 216 U. S. 1, 55.

A few days later, in a dissenting opinion in another case involving the same point of law, he said:

"I think that the tax in question * * * was lawful under all the decisions of this court until last week. * * * But I have not heard and have not been able to frame any reason that I honestly can say seems to me to justify the judgment of the court in point of law."[9] * * *

This is a clear illustration of the point under consideration. Did the court here reverse itself? Mr. Justice Holmes thought so and with him agreed Mr. Justice McKenna and Mr. Chief Justice Fuller. But the majority of the court declared no such intention. In fact it was following the doctrine of *stare decisis*. In other words, under a constitutional provision so phrased as is the Fourteenth Amendment, the lines of legal distinctions can be so finely drawn that even the most experienced jurists cannot agree on the relationship of one case to the other in the line of precedents.

In every branch of the law the rule of *stare decisis* is subject to occasional exceptions. These changes of position by the courts are extremely rare in questions dealing with the law of contracts and of property. The law here remains practically certain from generation to generation. But in the line of decisions under the Fourteenth Amendment uncertainty has been the rule. The Supreme Court has never been able to make here a practical application of the doctrine of *stare decisis*. Dissenting opinions have been prevalent all along the line. The first case under the Amendment was decided by a divided court of four against five.[10] Prior to 1883 there were twenty-five cases before the court under the Amendment. Ten of these, including practically every important case, were accompanied by dissenting opinions. In the lengthy and learned dissent of Mr. Justice Harlan in the *Civil Rights Cases*,[11] the following language is found:

"The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent Amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."

This is an extreme illustration of how the court is often divided in the matter of interpreting the Amendment.

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[9]Pullman Co. *v.* Kansas (1910) 216 U. S. 56, 77.

[10]Slaughter-House Cases (1872) 16 Wall. 36.

[11](1883) 109 U. S. 3, 26.

From 1872 to the close of the 1910-1911 Term of the Court, out of six hundred and four opinions delivered, one hundred and fifty-five were accompanied by dissenting opinions. This includes nearly all of the cases of real importance. The relation of this situation to the doctrine of *stare decisis* can readily be seen. While all of these cases are final in so far as they relate to the immediate parties, from the standpoint of judicial precedents as a source of law they are of questionable value.

Let us take one more concrete illustration. On November 3, 1896, there was submitted to the Supreme Court a case involving the constitutionality of the following Texas statute under the Fourteenth Amendment:[12]

"SECTION 1. *Be it enacted by the legislature of the State of Texas,* That after the time when this act shall take effect, any person in this State having a *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claims for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue."[13]

Let us call this the *Ellis Case.* The only point in controversy was the constitutionality of the clause relating to the attorney's fees. The statute had been upheld by the District Court, by the Court of Civil Appeals, and by the Supreme Court of Texas, respectively.[14] The majority of the Supreme Court of the United States declared the statute null and void by reason of the Four-

[12]Gulf, Colorado & Santa Fé Ry. Co. *v.* Ellis (1897) 165 U. S. 150.

[13]Sayles' Supplement to Texas Civil Statutes, p. 768, Art. 4266*a*.

[14](1894) 87 Tex. 19.

teenth Amendment in that the provision relating to the attorney's fees permitted the taking of property "without due process of law" and denied to the railroad companies the "equal protection of the laws." The opinion was delivered by Mr. Justice Brewer, with whom concurred Justices Field, Harlan, Brown, Shiras and Peckham. Forty-two cases were cited as precedents in the opinion of the court.

A dissenting opinion was delivered by Mr. Justice Gray, upholding the constitutionality of the statute, with whom concurred Mr. Justice White and Mr. Chief Justice Fuller. Fifteen cases were cited as precedents in the opinion.

On January 18, 1899, there came up before the Supreme Court a case[15] involving the constitutionality of the following Kansas statute:

"SECTION 1. *Be it enacted by the legislature of the State of Kansas:* That in all actions against any railway company organized or doing business in this State, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages, (which proof shall be *prima facie* evidence of negligence on the part of said railroad): Provided, that in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

"SECTION 2. In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment."[16]

In the *Ellis Case* the claim was for $50 for the killing of a colt by the railroad company, the lower courts assessing an attorney's fee of $10. In this case, which we shall call the *Matthews Case,* the damages allowed for loss by fire caused by the railroad were $2094 and the attorney's fees assessed at $225. The railroad company set up the claim, on the basis of the decision in the *Ellis Case* as a precedent, that the provision relating to the attorney's fees was a violation of the "due process of law" and the "equal protection" clauses of the Fourteenth Amendment. The Supreme Court by a majority opinion held the Kansas statute to be a valid enactment, distinguishing it from the Texas statute which was declared unconstitutional in the *Ellis Case.* Mr. Justice

[15]Atchison, Topeka & Santa Fé Ry. Co. *v.* Matthews (1899) 174 U. S. 96.

[16]Kansas Session Laws 1885, c. 155, 258.

Brewer again delivered the majority opinion and with him concurred Chief Justice Fuller, and Justices Gray, White and Shiras. Thirty-one cases were cited as precedents in the opinion.

There was a strong dissenting opinion by Mr. Justice Harlan, with whom concurred Justices Brown, Peckham and McKenna. Thirty-five cases were cited as precedents in the opinion. In speaking of the two cases Mr. Justice Harlan said:

"* * * Placing the present case beside the former case, I am not astute enough to perceive that the Kansas statute is consistent with the Fourteenth Amendment, if the Texas statute be unconstitutional."[17]

These statutes are essentially the same. It appears to the writer that the Texas statute is more safely constitutional under the Amendment than the Kansas statute in that it throws around the railroad company more safeguards and protection.

In looking over these two cases it will be noticed that the positions taken by Justices Harlan, Brown and Peckham against the constitutionality of both statutes, and the position of Chief Justice Fuller and Justices Gray and White in favor of the constitutionality of both statutes, remains the same in each instance. Mr. Justice Field, who decided with the majority in the *Ellis Case* against the Texas statute, was no longer on the bench in the *Matthews Case*, his place being supplied by Mr. Justice McKenna who decided with the minority in the *Matthews Case* against the Kansas statute. The new position taken by Justices Brewer and Shiras in the *Matthews Case* means, if not a reversal of the majority opinion in the *Ellis Case*, at least considerable confusion as to what legislation the people of the States may adopt along these lines.

This is a fair example of the futility of proposing that we wait until the Fourteenth Amendment be defined by the operation of the principle of *stare decisis*. Each side—not of the attorneys—but of the members of the Supreme Court itself, cited numerous precedents. If precedents could establish the law under the Amendment, both sides were right.

We may not expect a definition of the "due process of law" and the "equal protection" clauses of the Fourteenth Amendment. They are too vague and too elastic. This weakens the doctrine of *stare decisis* to the point where it no longer becomes authoritative. It thus leads to confusion instead of serving as a guide. The busi-

[17] (1899) 174 U. S. 96, 111.

ness interests do not know what laws the States may enact concerning them. The people of the States do not know how far they can go in their attempts to solve their own economic and social problems. The Fourteenth Amendment, uncertain in its scope from the day of its adoption, remains uncertain. Under present rules of procedure there is no escape from the dilemma.

October Term	Number of Cases	Due Process of Law Clause Involved: Liberty	Due Process of Law Clause Involved: Property	Equal Protection Clause Involved	Dissenting Opinions	October Term	Number of Cases	Due Process of Law Clause Involved: Liberty	Due Process of Law Clause Involved: Property	Equal Protection Clause Involved	Dissenting Opinions
1872.....	2	1	1	1	2	1892.....	10	1	5	4	
1873.....	1		1			1893.....	15	2	10	6	2
1874.....	1					1894.....	9	5	2	3	2
1875.....	4	1	2	2	1	1895.....	14	8	8	7	4
1876.....	1		1	1	1	1896.....	26	7	20	9	6
1877.....	4		4	1	1	1897.....	20	7	14	13	5
1878.....	0					1898.....	31	1	28	14	14
1879.....	5	2	1	4	2	1899.....	31	4	23	10	5
1880.....	1			1	1	1900.....	32	6	20	16	13
1881.....	2		2	1		1901.....	25	3	17	14	5
1882.....	4		1	3	2	1902.....	28	5	16	14	8
1883.....	5	1	3		3	1903.....	31	10	24	14	5
1884.....	5	2	3	1		1904.....	34	6	23	10	15
1885.....	7		5	4	1	1905.....	38	8	24	14	10
1886.....	4	1	2	3	1	1906.....	35	8	28	15	7
1887.....	12	2	8	8	3	1907.....	36	6	27	16	9
1888.....	8	1	7	4	2	1908.....	30	10	25	12	8
1889.....	10	1	8	7	2	1909.....	28	7	20	13	8
1890.....	13	10	6	2	2	1910.....	30	8	25	20	3
1891.....	12	2	9	5	2	Total.....	604	136	423	272	155

SUMMARY TABLE

SHOWING CERTAIN PHASES OF THE OPERATION OF THE FOURTEENTH AMENDMENT IN RELATION TO *STARE DECISIS.*

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